



COMPARATIVE HEALTH SYSTEMS LAW AND POLICY (LAW726H1F)

Professor Colleen M. Flood

September 2008

Faculty of Law
University of Toronto

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FACULTY OF LAW
UNIVERSITY OF TORONTO

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COMPARATIVE HEALTH SYSTEMS LAW AND POLICY (LAW726H1F)

Instructor: Colleen M. Flood, Faculty of Law, University of Toronto

September 8, 9, 10, 11, 15 and 16

Course Evaluation: Students will be required to write a 10-12 page research paper, which will be graded on an Honours/Pass/Fail basis. Papers must be delivered to the Records Office by 4:00 p.m. Friday October 10, 2008. Graduate students are graded on the graduate grading scale.

COURSE OUTLINE

Day 1, September 8: Overview of the Canadian Health Care System (2 hours)

Required Reading:

C.M. Flood, "Canada's Health Care System: Legal and Policy Perspectives".....	1
<i>Canada Health Act</i> , R.S., 1985, c. C-6.....	91

Supplementary Readings:

C. Tuohy, *Accidental Logics: The Dynamics of Change in the Health Care Arena in the United States, Britain, and Canada* (Oxford: Oxford University Press, 1999).

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada - Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) (Commissioner: Roy J. Romanow, Q.C.).

The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform* (Ottawa: Senate Standing Committee on Social Affairs, Science and Technology, 2002) (Chair: The Honourable Michael J.L. Kirby).

Task Force on the Funding of Health System, *Getting our Money's Worth* (Quebec City: Government of Quebec, 2007), Executive Summary available online:
<http://www.financementsante.gouv.qc.ca/en/rapport/index.asp>

Day 2, September 9: Economics and Distributive Justice in Health Services

Required Readings:

- C.M Flood and G. Read, “Back to Basics: Arguments for Government Intervention in Health Care”
[forthcoming].....99
- M. Trebilcock, “The Lessons and Limits of Law and Economics” (1997) 23 Monash Law Review 124 [updated 2005].....157
- P.M. Crosta, “Race Matters for Patients Awaiting Lung Transplants” *Medical News Today* (February 15, 2008).....203

Supplementary Reading:

- Centre for Health Services and Policy Research, Working Paper, “Economic Myths and Political Realities: The Inequality of Agenda and the Sustainability of Medicare” (1997), online: < <http://www.chspr.ubc.ca/node/791>>.
- A.J. Culyer, “ The normative Economics of Health Care Finance and Provision” (1989) 5 Oxf. Rev. Econ. Policy 881.
- David M. Cutler, “Equality, Efficiency, and Market Fundamentals: The Dynamics of International Medical-Care Reform” (2002) 40 J. Econ. Lit. 881.
- N. Daniels, “Justice, Health and Healthcare” (2001) 1 Am. J. Bioethics 2.

Day 3, September 15: Charter Challenges to Rationing Decisions in Health Care

Required Readings:

- The Cases in the Canadian Courts Chart.....205
- Section 7*
- C.M. Flood, “Chaoulli’s Legacy for the Future of Canadian Health Care Policy” (2006) 44 Osgoode Hall L.J. 273.....207
- Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [edited version found as Appendix C to C. M. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The*

Legal Debate Over Private Health Insurance in Canada (Toronto: University of Toronto Press, 2005).....237

McCreith & Holmes v. Government of Ontario (Statement of Claims).....254

Section 15:

Anton (Guardian ad litem of) v. British Columbia
(Attorney General), 2004 SCC 78 (edited).....284

Supplementary Readings:

AF v The General Manager (the Ontario Health Insurance Plan), HSARB Decision.

Flora v. Ontario Health Insurance Plan, 174 (2007) CanLII 339, (ON S.C.D.C.).

Cameron v. Nova Scotia (Attorney General), [1999] N.S.J. No. 297, [1999] 177 DLR (4th) 611.

S. Choudhry, "Worse than *Lochner*?" in C.M. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

C.M. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

D. Greschner & Steven Lewis, "*Anton* and Evidence-Based Decision-Making: Medicare in the Courts" (2003) 82 Canadian Bar Review 501.

Martha Jackman, "The Implications of Section 7 of the Charter for Health Care Spending in Canada" (Saskatoon: Commission on the Future of Health Care in Canada, 2002), online:

<http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=view&id=1145&contact_id=69&lang=en>

P. Monahan, "*Chaoulli v. Quebec* and the Future of Canadian Healthcare: Patient Accountability as the Sixth Principle of the Canada Health Act" (C.D. Howe Institute Benefactors Lecture, 2006) [unpublished, available on reserve in Bora Laskin].

Day 4, September 16: Administrative Appeals, Administrative Law and Tort Law Challenges to Rationing Decisions in Health Care

<i>Stein v. Québec (Regie de l'Assurance-maladie)</i> , [1999] Q.J. No. 2724 (edited).....	314
<i>Lalonde v. Ontario (Commission de restructuration des services de santé)</i> (2001) 56 O.R. (3d) 505, 56 O.R. (3d) 577 (edited).....	324
C.F. Flood, “Chaoulli: Political Undertows and Judicial Riptides” (Special Edition, Health Law Journal 2008) (edited)	339
Lorian Hardcastle, “Governmental Tort Liability in the Canadian Health Sector” [excerpted from SJD].....	346
<i>Cilinger v. Centre hospitalier de Chicoutimi</i> , (2004) R.J.Q. 3083.....	387
K. Syrett, “Rationing in the Courts: England” in <i>Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective</i> (Cambridge: Cambridge University Press, 2007).....	429

Supplementary Readings:

<i>C.C.-W. v The General Manager (the Ontario Health Insurance Plan)</i> (2006) 06-HIA-0051 (HSARB).	
<i>C.C.-W. v The General Manager</i> [Statement of Claim] OSC.	
Lorian Hardcastle, “Case Comment: <i>Cilinger c Centre Hospitalier de Chicoutimi</i> ” (2006) 14 Health Law Review 44.	

Day 5, September 17: Structure and Dynamics of Health Care Systems Around the World/Regulation of Public/Private Divide

Required Reading

C.M. Flood and Amanda Haugan, “Regulation of Choice: A Comparison of Canadian and European Healthcare Systems” [forthcoming].....	440
J. White, “American Medical Care: Comparative Lessons of and for It” in T. Marmor, K. Okma and R. Freeman eds., <i>Comparative Perspectives and Policy Learning in the World of Health Care</i> (New Haven: Yale University Press, 2007).....	472
OECD Health Data 2008, “How Does the United States Compare”.....	526

Commonwealth Fund, *Health Policy Reform: Beyond the 2008 Elections, a resource for Journalist from the Commonwealth Fund*, online:
 <http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=671629>.....529

Supplementary Readings:

F. Colombo, & N. Tapay, “Private health insurance in OECD countries: the benefits and costs for individuals and health systems”, OECD Health Working Paper 15, 2004, online:
 <http://www.oecd.org/document/10/0,3343,en_2649_37407_33913226_1_1_1_1,00&en-USS_01DBC.html>

Colleen M. Flood, Mark Stabile and Carolyn Tuohy, “How Does Private Finance Affect Public Health Care Systems: Marshalling the Evidence from OECD Nations” (2004) 29 *Journal of Health Politics Policy and Law* 359.

A. Gauthier, S.C. Schoenbaum & I. Weinbaum, *Towards A High Performance Health System for the United States* (Commonwealth Fund (March 2006), online:
 <http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=362744>

T. Jost, “The new governance, the open method of coordination and social health insurance in Europe” (2006) 7 *Med. L. Int.* 249-263

T. Jost, “Global Health Care Financing Law: A Useful Concept” (2008) 96 *Geo. L.J.* 41.

E. Mossialos, et al., eds., *Funding Health Care: Options for Europe* (Buckingham: Open University Press, 2002)

C. Normand, “Using social health insurance to meet health policy goals” (1999) 48 *Soc. Sci. & Med.* 865.

Day 6, September 18: Legal Challenges to the Health Care System: World View

Required Reading:

Joanna Manning & Ron Paterson, “‘Prioritization’: Rationing Health Care in New Zealand” (2005) 33 *Journal of Law, Medicine and Ethics* 681.....541

Shortland v Northland Health Ltd - [1998] 1 NZLR 433.....558

K. Syrett, “Rationing in the Courts: England” in *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective*, (Cambridge: Cambridge

University Press, 2007) c.6	(from Day 4, page 429)
K. Syrett, “Rationing in the Courts: South Africa” in <i>Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective</i> , (Cambridge: Cambridge University Press, 2007) c. 8	573
C. Shalev & D. Chinitz, “Joc Public v. The General Public: The Role of the Courts in Israeli Health Care Policy” (2005) 33 J.L. Med. & Ethics 651	585

Supplementary Reading:

Marmor, T., Freeman, R. & Okma, K., “Comparative perspectives and policy learning in the world of health care” (2005) 7 *Journal of Comparative Policy Analysis* 331.

R v. Cambridge District Health Authority ex parte B, [1995] 1 FLR 1055

THE CANADIAN SYSTEM:

A HEALTH LAW AND POLICY PERSPECTIVE*

Colleen M. Flood

I. INTRODUCTION

In this paper, my goal is to provide an overview of Canada's Medicare system from a health law and policy perspective, focussing on governance, funding, delivery, reform, and the relevant legal frameworks. This will allow readers to better understand the context in which health-provider and patient relationships occur and to think about larger system design issues. First, I outline some of the contemporary case-law demonstrating the interaction of the courts and legal scholarship with the health care system. I then turn to explore the present problems (or distractions!) within the Canadian health care system, namely cost, access, and public satisfaction; this is then followed by a description of public and private funding of the Canadian system. Within the section on public funding, I discuss the constitutional division of powers, the history of the development of the publicly funded system, the criteria of the *Canada Health Act*¹ ("CHA"), and how the Act is enforced. Lastly, having explored how the system is financed, I turn to delivery, exploring the roles of physicians, nurses, hospitals, and regional health authorities.

II. LAW AND THE HEALTH CARE SYSTEM

* This article is based on "The Anatomy of Medicare" in Jocelyn Downie, Tim Caulfield & Colleen Flood, eds., *Canadian Health Law & Policy*, 2nd ed. (Markham: Butterworths, 2002) 1.

¹ R.S.C. 1985, c. C-6

